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In the Supreme Court of the United States

ROBERT J. LATSCH,

Petitioner,

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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January 5, 2011

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QUESTION PRESENTED

Whether injured soldiers who apply for veteran's disability benefits possess a property interest protected by the Due Process Clause of the Fifth Amendment and, if so, whether Petitioner's due process rights were violated when the Board of Veterans Appeals requested that the Department of Veteran Affair's medical expert change the ultimate outcome of his opinion from one in support of a finding of service connection for the service member's injuries to one against a finding of service connection.

Whether Petitioner's rights to Equal Protection under the Fifth Amendment were violated because the Department of Veterans Affairs provides different and less medical care and benefits to veterans of the Army Reserve than it does to "regular" Army veterans.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Federal Circuit:

The petitioner here and claimant-appellant below is Robert J. Latsch.

The respondent here and respondent-appellee below is Eric K. Shinseki, Secretary of Veterans Affairs.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION ... 9

I. The DVA DEPRIVED MR. LATSCH OF HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY SECRETLY ALTERING THE MEDICAL OPINION OF THE DVA EXPERT 9

II. THE DVA'S DECISION VIOLATES EQUAL PROTECTION UNDER THE LAWS BECAUSE IT TREATS INJURED MEMBERS OF THE RESERVE DIFFERENTLY THAN MEMBERS OF THE REGULAR ARMY WITHOUT A LEGITIMATE GOVERNMENT INTEREST . 16

CONCLUSION 24

APPENDIX

Appendix A: Judgment, United States Court of Appeals for the Federal Circuit, (October 7, 2010) 1a

Appendix B: Judgment, United States Court of Appeals for Veterans Claims, [A1], (October 23, 2009) 3a

Appendix C: Memorandum Decision, United States Court of Appeals for Veterans Claims, [A7-A13], (September 30, 2009) 5a

Appendix D: Order, Board of Veterans' Appeals, [A14-A26], (February 19, 2008) 16a

Appendix E: Letter from Donald N. Gill, M.D., [A46], (August 6, 2003) 32a

Appendix F: Letter from Donald N. Gill, M.D., [A47], (May 26, 2004) 34a

Appendix G: Letter from Charles L. Miller, M.D., F.A.C.C., [A50], (July 27, 2005) 36a

Appendix H: Letter from Charles L. Miller, M.D., F.A.C.C., [A51], (August 2, 2006) 38a

Appendix I: Letter from Don P. Speers, Jr., COL, MC, Commanding, [A52], (August 21, 2006) 40a

Appendix J: Letter from Alan Rozanski, MD, Professor of Medicine, Columbia University College of Physicians and Surgeons, [A53], (November 29, 2006) 42a

Appendix K: Letter from Vincent T. Randazzo, MD, [A54], (January 29, 2007) 45a

Appendix L: Letter from Narayana Swamy, M.D., [A58], (March 28, 2007) 47a

Appendix M: Letter from Don P. Speers, Jr., COL, MC, Commanding, [A59], (April 27, 2007) 49a

Appendix N: Letter from Charles L. Miller, M.D., F.A.C.C., [A60], (May 15, 2007) 51a

Appendix O: Letter from Vincent T. Randazzo, MD, [A61], (May 17, 2007) 53a

Appendix P: Letter from Vincent T. Randazzo, MD, [A65], (July 6, 2007) 55a

Appendix Q: Memorandum from David Lu, MD to Board of Veterans' Appeals, [A66-A67], (August 30, 2007) 57a

Appendix R: Letter from Carrie M. Johnson-Clark, Director, Management and Administration to Ross D. Fletcher, M.D., [A68], (September 13, 2007) 61a

Appendix S: Memorandum from David Lu, MD to Board of Veterans' Appeals, [A69-A70], (August 30, 2007) 63a

Appendix T: Letter from Charles L. Miller, M.D., F.A.C.C., [A71], (November 20, 2007) 67a

Appendix U: Memorandum from David Lu, MD to Board of Veterans' Appeals, [A80-A81], (August 30, 2007) 69a

TABLE OF AUTHORITIES

CASES

Atkins v. Parker,
472 U.S. 115 (1985) 10

Bd. of Regents of State Colls. v. Roth,
408 U.S. 564 (1972) 10

Bolling v. Sharpe,
347 U.S. 497 (1954) 17

Brannon v. Derwinski,
1 Vet. App. 314 (Vet. App. 1991) 21

Capellan v. Peake,
539 F.3d 1373 (Fed. Cir. 2008) 15

Crawford v. Pennsylvania,
No. 1:CV-03-693, 2005 U.S. Dist. LEXIS 43100 (M.D. Pa. Oct. 6, 2005), *vacated in part on other grounds*, 2006 U.S. Dist. LEXIS 3725 (M.D. Pa. Jan. 19, 2006) 15, 16

Cushman v. Shinseki,
576 F.3d 1290 (Fed Cir. 2009) 8, 10, 11, 15

Gilbert v. Derwinski,
1 Vet. App. 49 (Vet. App. 1990) 12, 13

Mathews v. Eldridge,
424 U.S. 319 (1976) 10

Reed v. Reed,
404 U.S. 71 (1971) 17

Rivera v. Peake,
No. 06-3518, 2008 U.S. App. Vet. Claims LEXIS 1242 (Vet. App. Oct. 15, 2008) 19

Strickler v. Greene,
527 U.S. 263 (1999) 16

Town of Castle Rock, Colo. v. Gonzales,
545 U.S. 748 (2005) 10

Weinberger v. Weisenfeld,
420 U.S. 636 (1975) 17

CONSTITUTION

U.S. Const. amend. V . . . . . *passim*
U.S. Const. amend. XIV 17

STATUTES

28 U.S.C. § 1254(1) 2
38 U.S.C. § 101 18
38 U.S.C. § 101 (23)-(24) 9
38 U.S.C. § 101 (23)(A) 20
38 U.S.C. § 101 (23)(B) 4, 22, 23
38 U.S.C. § 101 (24) 3, 18
38 U.S.C. § 106(d) 22, 23
38 U.S.C. § 1131 (2010) 2, 18
38 U.S.C. § 1153 (2010) 23
38 U.S.C. § 3007(b) 12
38 U.S.C. § 7104(a) 1
38 U.S.C. § 7252(a) (2010) 1

REGULATIONS

38 C.F.R. § 3.6 (2008) 19

38 C.F.R. § 3.303(a) (2010) 21
38 C.F.R. § 3.303(b) (2010) 21

RULES

Fed. R. App. P. 4 1

PETITION FOR A WRIT OF CERTIORARI

Robert J. Latsch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Board of Veterans' Appeals reviewed the determination of the Regional Office pursuant to 38 U.S.C. § 7104(a). That order is unreported, but can be found in the appendix at App., *infra,* 16a-31a. On February 19, 2008, Veterans Law Judge George R. Senyk affirmed the decision of the Regional Office and denied service connection. *Ibid.*

Mr. Latsch appealed the decision of the Board of Veterans' Appeals to the United States Court of Appeals for Veterans Claims, which has exclusive jurisdiction pursuant to 38 U.S.C. § 7252(a) (2010). Judge Lawrence B. Hagel of the United States Court of Appeals for Veterans Claims issued an unreported opinion affirming the decision of the Board of Veterans' Appeals on September 30, 2009, and the clerk of the Court entered judgment on October 23, 2009. App., *infra*, 3a-15a.

Mr. Latsch filed his Notice of Appeal to the United States Court of Appeals for the Federal Circuit on November 12, 2009, within the time limit established by Fed. R. App. P. 4. The case was docketed on January 27, 2010. The Federal Circuit Court of Appeals entered an Order affirming without an opinion on October 7, 2010. App., *infra*, 1a-2a.

STATEMENT OF JURISDICTION

The Federal Circuit entered judgment on October 7, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

> For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter [38 USCS §§ 1131 et seq.], but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

38 U.S.C. § 1131 (2010).

> The term "active military, naval, or air service" includes--
>
> (A) active duty;
>
> (B) any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty; and

(C) any period of inactive duty training during which the individual concerned was disabled or died--

(i) from an injury incurred or aggravated in line of duty; or

(ii) from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident occurring during such training.

38 U.S.C. § 101 (24).

The term "inactive duty training" means--

(A) duty (other than full-time duty) prescribed for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) by the Secretary concerned under section 206 of title 37 [37 USCS § 206] or any other provision of law;

(B) special additional duties authorized for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned; and

(C) training (other than active duty for training) by a member of, or applicant for membership (as defined in section 8140(g) of title 5 [5 USCS § 8140(g)]) in, the Senior Reserve Officers' Training Corps prescribed under chapter 103 of title 10 [10 USCS §§ 2101 et seq.].

In the case of a member of the National Guard or Air National Guard of any State, such term

> means duty (other than full-time duty) under sections 316, 502, 503, 504, or 505 of title 32 [32 USCS §§ 316, 502, 503, 504, or 505], or the prior corresponding provisions of law. Such term does not include (i) work or study performed in connection with correspondence courses, (ii) attendance at an educational institution in an inactive status, or (iii) duty performed as a temporary member of the Coast Guard Reserve.

38 U.S.C. § 101(23)(B).

STATEMENT OF THE CASE

The Federal Circuit Court of Appeals held that Mr. Latsch's rights under the Due Process Clause of the Fifth Amendment had not been violated by the Board of Veterans' Appeals' ("BVA") request that the Department of Veterans' Affairs' ("DVA") medical expert change the ultimate conclusion of his report from one that favored the granting of benefits to one that formed the sole evidentiary basis for the denial of benefits. This request to the medical expert was done without notice to Mr. Latsch, without explanation by the expert, without even a change in date from his original report. More significantly, the altered report served as the entire basis for the BVA and the Court of Veterans' Appeals' denial of benefits.

The Court of Veterans' Appeals also rejected arguments that Mr. Latsch's request for benefits should be treated no differently whether he was a member of the Reserve Forces or was regular Army.

Due Process Issues

The facts of this case as presented by Petitioner were never disputed at any stage of the proceedings.

Mr. Latsch was a loyal and dedicated service member, devoting over twenty years to his military career. Mr. Latsch first served in the United States Air Force in 1956 and was given a general discharge under honorable conditions shortly thereafter. App., *infra*, 17a. He then served in the Army Reserve from August 1975 through August 1994. *Ibid.* At the time he suffered his heart attack in February of 1987, Mr. Latsch's job on paper, according to his Military Occupation Skill ("MOS") designation, was "First Cook," but he was also doing the job of the mess sergeant. His additional (unrecognized) duties included records inspections, planning, serving and cleanup. Mr. Latsch was doing the work of two people, and he was under enormous stress. He had to bring paperwork home from his weekend assignment and complete the work during the week, while he was not physically present on base. Additionally, Mr. Latsch was burdened by his recent reassignments to locations which required substantial travel. He had been assigned to a military installation in Pedricktown, NJ. Traveling to Pedricktown for his monthly weekend training required a five-hour round-trip drive. The location had no facilities for Mr. Latsch to stay overnight on the weekend, so he was forced to make the long commutes each day he reported for Reserve training.

Although he knew the extra work and long commutes were putting too much stress on him, and he likewise knew he was unlikely to receive any extra

recognition or a promotion for his extra work, Mr. Latsch did not complain. Instead, he steadfastly continued to serve his country as a good soldier.

On Tuesday, February 3, 1987, Mr. Latsch suffered a myocardial infarction (a "heart attack"), and was taken to the hospital while at home reviewing paperwork for his Reserve duties. Several days later, he had bypass surgery. *Id.* at 32a. After recovering from surgery, Mr. Latsch resumed his Reserve duties until 1994. *Id.* at 17a.

On September 23, 2003, Mr. Latsch applied to the DVA for disability compensation. The Newark, NJ, Regional Office ("RO") handled his case. *Ibid.*

By the time his case reached the BVA in 2007, the medical reports and opinions submitted overwhelmingly concluded that his heart attack was caused or aggravated by the stress of his military service. Specifically, no less than five expert medical opinions concluded that Mr. Latsch's myocardial infarction and heart condition were caused or aggravated by the stress of his military service. *Id.* at 32a-60a.

Furthermore, Drs. Swamy and Lu, the DVA's *own* medical experts, concluded that it was "as likely as not" that Mr. Latsch's heart condition was caused by the stress of his military duties. *Id.* at 47a, 59a.

Dissatisfied with the conclusions of its own experts, which would have formed the basis for granting disability benefits, the BVA wrote the head of Dr. Lu's department on September 13, 2007: "Please clarify the following issue: Dr. Lu states that stress is as likely as

not a cause of CAD, but his opinion is largely supportive of his conclusion that there is insufficient evidence to show such an association." *Id.* at 61a.

Dr. Lu's opinion was revised, by whom it is not certain, without explanation or even a change in the date of the original report, August 30, 2007. *Id.* at 63a-66a. Not only was the new report dated the same as his old report, it was almost identical to his prior opinion, and did not mention that a second request for "clarification" had been made, or that this report was a revised report. Appendix Q and Appendix S are the two Dr. Lu reports dated August 30, 2007, but with different conclusions.

Significantly, neither Mr. Latsch nor his counsel were aware of the original report finding that his condition was "as likely as not" caused or aggravated by service condition, and were only given the revised report. The original "as likely as not" conclusion would have supported the granting of benefits to Petitioner.

This is the critically important difference between the two reports from Dr. Lu, both dated August 30, 2007: Dr. Lu, or some person from his office, deleted the first report's conclusion that the cardiac condition was "***as likely as not***" caused by stress from the military, and replaced it with the new assertion that it was "***unlikely***" that stress caused the condition. *Id.* at 65a. The record provides no explanation whatsoever from Dr. Lu for contradicting the ultimate conclusion of his prior opinion.

The record then continues in support of service connection, with the November 20, 2007, report of Dr. Miller, which concludes that "stress has played a

major role in [Mr. Latsch's] coronary artery disease." *Id.* at 67a.

The BVA denied Mr. Latsch's appeal of the denial of his benefits. *Id.* at 31a. It found that Mr. Latsch had not submitted competent evidence that his heart condition was service connected. *Id.* at 18a. The BVA relied exclusively on the *revised* opinion of Dr. Lu.

The United States Court of Appeals for Veterans Claims ("Veterans Court") affirmed the Board's decision, again relying exclusively on the altered report of Dr. Lu. *Id.* at 14a-15a.

The Supreme Court has never decided the specific issue of whether a veteran applying for disability benefits possesses a property interest in those benefits protected by the Due Process Clause of the Fifth Amendment. The Federal Circuit has found that such a right exists, but declined to extend its holding in *Cushman v. Shinseki*, 576 F.3d 1290 (Fed Cir. 2009), to this case.

The alteration and concealment of the expert testimony that formed the basis of the denial of benefits would have, in its original form, formed the basis of an award of disability benefits. Due process has been violated because Mr. Latsch was not given a fair opportunity to cross-examine and impeach Dr. Lu and because Dr. Lu's revised opinion was the foundation of the expert testimony against service connection and, as such, informed the whole of BVA's decision against an award of benefits.

Equal Protection Issues

The Court of Appeals also declined to treat Mr. Latsch as it would an "active-duty" service member, despite clear statutory and regulatory provisions declaring it should. Notwithstanding that the DVA could not point to a single statute, regulation or case requiring Mr. Latsch to have been physically present on a military base when his heart condition became manifest in order to be eligible for benefits, its rejection of his appeal without decision implicitly mandated that this was a requirement for members of the Reserve Forces. There is no foundation in law for this determination. To the contrary, the law mandates no such requirement, and in creating such artificial barriers to a disability determination, the DVA has violated the Equal Protection guarantees of the Fifth Amendment. 38 U.S.C. § 101 (23)-(24).

REASONS FOR GRANTING THE PETITION

I. The DVA DEPRIVED MR. LATSCH OF HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY SECRETLY ALTERING THE MEDICAL OPINION OF THE DVA EXPERT

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person . . . shall be . . . deprived of life, liberty, or property, without due process of law." This requirement guarantees a claimant notice and a fair opportunity to be heard. The Supreme Court has never resolved the issue of whether a veteran applicant for disability benefits has a property interest protected by the Due Process Clause of the Fifth

Amendment. *See Atkins v. Parker*, 472 U.S. 115, 128 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (citing decisions holding that disability benefits *already granted* are a protected property interest and may not be discontinued without due process of law); *see also Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) ("'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

Notwithstanding its decision below and the lack of a Supreme Court precedent directly addressing the issue, the Federal Circuit has held that the statutorily created right to veterans benefits is a protected property interest under the Fifth Amendment Due Process Clause. *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009). In *Cushman*, a veteran challenged the DVA's denial of disability benefits for a back and spinal injury he suffered while serving in the Marines. *Id.* at 1292-95. He had originally received a 60% partial disability rating for his injury. *Id.* at 1292. Several years later, his back condition had worsened and he became completely unable to work, even in a sedentary position. The veteran applied for benefits for total disability. *Id.* at 1292-93. The DVA denied his application. *Ibid.* The BVA affirmed the denial, citing (generally) evidence from the veteran's medical records and stating that it did not preclude sedentary employment. *Id.* at 1293.

Nearly two decades later, the veteran discovered that the medical records that the BVA relied upon in its decision denying benefits for total disability had

been supplemented without explanation. *Ibid.* The original records contained the following statement: "'Is worse + must stop present type of work.'" *Ibid.* The altered records included the same statement, but with an additional notation: "'Is worse + must stop present type of work, *or at least [] bend [] stoop lift.*' (emphasis added brackets indicate illegible or stray marks)." *Ibid.* The DVA had relied on the supplemented notation when it made its decision. *Ibid.*

This Court held that the initial determination of the veteran's total disability claim was "tainted by the presence of an improperly altered document." *Id.* at 1299. Furthermore, that determination "ha[d] been subject to nothing but deferential review, on a record that still contained the altered document." *Ibid.* Accordingly, the Court held that the veteran's Due Process rights had not been satisfied because he never had a fair hearing on the merits of his disability claim. *Ibid.* Moreover, "[f]raudulent intent on the part of the presenter of the false evidence is not required to find a due process violation." *Id.* at 1300. Accordingly, the Court vacated the decision below and remanded for *de novo* determination of the total disability request on a record without the altered medical documents. *Id.* at 1302.

The facts here are remarkably similar. The BVA requested a medical opinion to clarify the cause of Mr. Latsch's heart attack on February 6, 2007. The request asked for a specific statement of the likelihood that the coronary artery disease is causally related to the stress Mr. Latsch was experiencing and asked for comments on the medical opinions of Drs. Gill, Miller, Speers, Rozanski, and Randazzo. On March 28, 2007,

Dr. Narayana Swamy provided an opinion in which he stated, "[i]t is ***as likely as not*** that the veteran suffered a heart attack from prolonged stress." App., *infra*, 48a (emphasis added). Dr. Swamy did not comment on the letters from Drs. Gill, Miller, Speers, Rozanski, and Randazzo. *Id.* at 47a-48a.

An "as likely as not" determination provides the necessary evidentiary proof under the liberal "benefit of the doubt" standard of proof for granting benefits under the laws governing DVA disability benefits proceedings. At one end of the standard of proof spectrum is the requirement in criminal proceedings that guilt be established "beyond a reasonable doubt," followed by the less stringent "clear and convincing evidence" standard, and the even less stringent "preponderance of the evidence" used in most civil disputes over money damages. *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-54 (Vet. App. 1990) At the farthest end of the spectrum, with even a lesser burden than "preponderance of the evidence," is the statutory standard of proof applicable to this case, named the "benefit of the doubt" standard, for dealing with veterans benefits. *Id.* at 54.

As was explained in *Gilbert*, 1 Vet. App. at 53, a veteran need only demonstrate that there is an "approximate balance of positive and negative evidence" in order to prevail, and the preponderance of the evidence must be *against* the claim for benefits to be denied. (quoting 38 U.S.C. § 3007(b)) (internal quotation marks omitted).

As further explained in *Gilbert*: "This unique standard of proof is in keeping with the high esteem in which our nation holds those who have served in the

Armed Services. It is in recognition of our debt to our veterans that society has through legislation taken upon itself the risk of error. . . ." *Id.* at 54.

Accordingly, an "as likely as not" determination by the DVA's medical experts would prevent a showing by the preponderance of the evidence against a determination of benefits, and this is why the DVA made such great and artificial efforts to eradicate such a finding.

Dissatisfied with the contents of Dr. Swamy's "as likely as not" opinion, the BVA requested another opinion on July 16, 2007. "A medical opinion [was] sought to reconcile (with a detailed explanation of the rationale) the conflicting opinions as to whether the veteran's coronary artery disease is causally related to his service."

Once again, the letter requested "a detailed medical opinion as to the likelihood (*i.e., very likely, as likely as not, or highly unlikely*) that the veteran's currently diagnosed coronary artery disease is causally related to the 'stress' he contends was associated with his periods of reserve duty."

On August 30, 2007, Dr. David Lu provided the requested opinion. App., *infra*, 57a-60a. Dr. Lu concluded "At this time, it is my opinion that psychosocial stress ***is as likely as not*** to cause coronary artery disease." *Id.* at 59a (emphasis added). Dr. Lu's conclusion about the likelihood that Mr. Latsch's stress caused his heart attack was the same as Dr. Swamy's: it was "as likely as not." *Id.* at 48a, 59a. But the BVA was not satisfied with Dr. Lu's conclusion either. The BVA demanded a modification

of the "bottom line" opinion offered by Dr. Lu. By letter dated September 13, 2007, the BVA wrote to Dr. Lu's hospital:

> The medical opinion provided on the above veteran was determined to be confusing and requires clarification. Please clarify the following issue: Dr. Lu states that stress is as likely as not a cause of [Mr. Latsch's coronary artery disease], but his opinion is largely supportive of his conclusion that there is insufficient evidence to show such an association.

Id. at 61a.

The purpose of this correspondence is obvious. After receiving ***two*** DVA medical opinions stating that stress was "as likely as not" the cause of Mr. Latsch's heart attack (in addition to the 12 opinion letters from the five medical experts which were submitted by Mr. Latsch that all state his condition was substantially caused by his service stress), the DVA was now specifically requesting that the opinion be altered to reflect a determination more helpful to its efforts to deny Mr. Latsch benefits. Not surprisingly, Dr. Lu complied. *Id.* at 63a-66a. He issued a new opinion with the same date and with no notation that it had been reconsidered, altered, corrected or modified. *Ibid.* The new opinion was identical to the old one, except that its conclusion was now opposite to his first conclusion, and stated: "At this time, it is my opinion that psychosocial stress is ***unlikely*** to cause coronary artery disease." *Id.* at 65a (emphasis added).

The BVA relied exclusively on Dr. Lu's altered opinion in its affirmation of the denial of benefits. *Id.* at 29a-30a. Because the BVA ignored the medical evidence submitted by Mr. Latsch which disagreed with Dr. Lu's "revised" opinion, the BVA held that the preponderance of the evidence was against Mr. Latsch's claim, so the benefit of the doubt standard of proof "did not apply." *Id.* at 29a-31a

However, even assuming, *arguendo*, that the Board properly disregarded the opinions of Drs. Gill, Miller, Speers, Rozanski, and Randazzo, the outcome would have been different if it had not forced the alteration of Dr. Lu's opinion. Dr. Lu's original opinion stated that it was "as likely as not" (i.e., an approximate balance of positive and negative evidence) that Mr. Latsch's stress caused his coronary artery disease and heart attack. *Id.* at 59a. The unaltered opinion by itself would have required a decision in favor of the veteran. *See Capellan v. Peake*, 539 F.3d 1373, 1381 (Fed. Cir. 2008) ("The 'benefit of the doubt' statute, 38 U.S.C. § 5107(b), and the analogous 'reasonable doubt' regulation, 38 C.F.R. § 3.102, apply to all material facts relating to a claim . . . ."). Like the veteran in *Cushman*, Mr. Latsch's case was improperly tainted by altered evidence.

A determination that the concealment and alteration of expert testimony violates Due Process can be found in the analogous context of manipulation of a State's witness in criminal proceedings. For example, in *Crawford v. Pennsylvania*, No. 1:CV-03-693, 2005 U.S. Dist. LEXIS 43100 (M.D. Pa. Oct. 6, 2005), *vacated in part on other grounds*, 2006 U.S. Dist. LEXIS 3725 (M.D. Pa. Jan. 19, 2006), the plaintiff brought an action against the State for his wrongful

imprisonment. One of his claims were for violation of his due process rights on account of information that was redacted from the expert report offered at trial. The Court denied summary judgment seeking dismissal of his claim stating:

> In short, the alteration and concealment of the facts that formed the basis for the testimony regarding the only physical evidence implicating Crawford for this crime not only tend to be exculpatory under Brady, they support Plaintiff's claim that he was denied a fair trial, and thus was denied liberty without due process of law. The due process problem is not limited to the fact that Crawford was not given the opportunity to fairly cross-examine and impeach the Commonwealth's witnesses; because the lab report formed the foundation of the expert testimony, it informed the whole of the Commonwealth's case. As such, the original lab note, which may demonstrate to a jury the holes in the Commonwealth's case, undermines the confidence in the outcome of the criminal trial.

Id. at *33 (citing *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999)).

II. THE DVA'S DECISION VIOLATES EQUAL PROTECTION UNDER THE LAWS BECAUSE IT TREATS INJURED MEMBERS OF THE RESERVE DIFFERENTLY THAN MEMBERS OF THE REGULAR ARMY WITHOUT A LEGITIMATE GOVERNMENT INTEREST

The United States of America has had an all volunteer military since the end of the Vietnam War.

Since September 11, 2001, our nation has used the Reserve Forces in an unprecedented manner, sending them overseas to fight multiple wars, and subjecting them to multiple tours. Nevertheless, the stigma of being a member of the Reserve exists to this day, with such service members often receiving less or inferior medical treatment, equipment and benefits. If there ever was, there is no longer any legitimate justification for this "second-class" treatment of members of the Army Reserve. The decisions below, however, strained unnaturally to find a way to do just that, contrary to justice and the modern statutory framework drafted by our legislature.

Although it was undisputed below that the DVA could point to no statute, regulation or precedent requiring Mr. Latsch's heart attack to have occurred on a military base in order to qualify him for veterans disability benefits, the Court of Appeals rejection of his arguments on this point implicitly require such an unnecessary and unprescribed hurdle.

Equal protection of the law means the government cannot provide dissimilar treatment to those who are "similarly situated." *Reed v. Reed*, 404 U.S. 71, 77 (1971) (interpreting the Equal Protection Clause of the Fourteenth Amendment). The Fourteenth Amendment's guarantee, however, applies only to the States. The Supreme Court has held, however, that there is also an equal protection guarantee within the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The approach to Fifth Amendment equal protection claims is precisely the same as equal protection claims under the Fourteenth Amendment. *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975).

In the present matter, the statutory framework provided by Congress, if it was applied as written, would have resulted in different treatment for Mr. Latsch whether he was a member of the Army Reserve or "regular" Army.

The BVA and the Court of Veterans Appeals (collectively referred to as the Veterans Court) both concluded that Mr. Latsch was not on active duty and, therefore, not eligible for benefits, notwithstanding that they also found that his cardiac arrest and subsequent cardiac condition became first manifest in 1987, a time when he was either active duty for training or inactive duty for training.

The DVA's disability benefits statute provides that "[f]or a disability resulting from personal injury suffered . . . or for aggravation of a preexisting injury suffered . . . in the active military, naval or air service . . . the United States will pay any veteran thus disabled . . . compensation as provided in this subchapter." 38 U.S.C. § 1131 (2010).

Furthermore, 38 U.S.C. § 101 provides that a service member who is in a period of inactive training is considered to be on active duty under certain circumstances. Specifically, 38 U.S.C. § 101 (24) states:

> (24) **The term "active military, naval, or air service" includes--**
>
> (A) active duty;
>
> (B) any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty; and

> (C) **any period of inactive duty training during which the individual concerned was disabled or died--**
>
> (i) from an injury incurred or aggravated in line of duty; or
>
> (ii) **from an acute myocardial infarction, a cardiac arrest**, or a cerebrovascular accident occurring during such training.

(emphasis added).

As such, the plain wording of the statute provides that service connection is available for injuries sustained during inactive duty for training under limited circumstances, including when a veteran suffers a cardiac arrest during that inactive training period. *Rivera v. Peake*, No. 06-3518, 2008 U.S. App. Vet. Claims LEXIS 1242, *3-4 (Vet. App. Oct. 15, 2008); 38 C.F.R. § 3.6 (2008).

It is undisputed that Mr. Latsch was in the Army Reserve at the time of his myocardial infarction in 1987, and that after his heart attack, Mr. Latsch's cardiac disease was diagnosed and manifested itself throughout the remainder of his military career until it ultimately caused his discharge.

On this issue, the Veterans Court explained in a footnote that

> There are two types of reserve training, active and inactive. Active duty for training means full time duty performed by reservists or National Guard members for training purposes under orders for active duty. 38 U.S.C.

> §§ 101(22)(B), (C). Inactive duty for training means non-full time duty for reservists as prescribed by the Secretary of each military department (commonly in the form of weekend drills and two-week yearly training periods). 38 U.S.C. § 101(23)(A).

App., *infra*, 11a n.3.

The Veterans Court concluded that

> Because members of the reserve components of the armed forces, except when called to federal service, involve periods of non-active duty, there is special consideration for determining when a claimed disease or injury is service connected. There must be evidence that the disease or injury is directly related to training. For Mr. Latsch, who served in the Army Reserve, to establish that his coronary artery disease is service connected, there must be evidence showing that he was disabled by disease or injury incurred in or aggravated while he was performing active or inactive duty for training. 38 U.S.C. §§ 101(22), (24), 1110. Thus, his heart attack is simply evidence that he suffered from coronary artery disease, and he must present evidence that the coronary artery disease was incurred in or aggravated during training.

Id. at 10a-11a.

The Veterans Court's conclusions that, as a reservist Mr. Latsch is under a heavier legal burden, is a legally erroneous interpretation of the statutory and regulatory provisions pertaining to a veteran's

ability to establish service connection and a violation of Equal Protection under the laws as guaranteed by the Fifth Amendment.

The law cited above makes clear that in the specific scenario of a cardiac arrest during a period of inactive training, the law treats Mr. Latsch no different than any other active duty soldier. Once it was shown that his heart attack occurred during a period of inactive duty for training, the burden thereafter was merely that "a particular injury or disease resulting in disability was incurred ***coincident*** with service in the Armed Forces." 38 C.F.R. § 3.303(a) (2010) (emphasis added).

The Veterans Court's assertion that Mr. Latsch's heart attack is "simply evidence that he suffered from coronary artery disease," and that he must present additional evidence that his disease was aggravated during training, is also an erroneous interpretation of the statutory and regulatory provisions at play in this case. Once the diagnosis of myocardial infarction is established during active service, later manifestations of cardiac disease should be service connected unless "clearly attributable to intervening causes." 38 C.F.R. § 3.303(b) (2010); *see Brannon v. Derwinski*, 1 Vet. App. 314 (Vet. App. 1991).

The Veterans Court's erroneous interpretation of the law saddles Mr. Latsch with a burden of proof far greater than that actually provided in the statutory and regulatory framework, far greater than is imposed upon "regular" Army service members and, as such, is a violation of his rights under the Fifth Amendment's guarantee of Equal Protection under the law.

There can be no disputing that Mr. Latsch suffered a myocardial infarction during a period of inactive duty training.

"Inactive duty training" includes: "special additional duties authorized for Reserves . . . by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned." 38 U.S.C. § 101(23)(B) (2010).

At the time of his heart attack, Mr. Latsch was responsible for preparing meals for hundreds of soldiers. His double duties required him not only to cook, but to plan and order inventory and food to prepare for future meals and to complete such mess hall paperwork during the week. The night Mr. Latsch had his heart attack, he had been working on his mess hall paperwork.

He was performing his military duties despite the fact that he was not physically on base.

The Secretary argued below and, the Court of Appeals accepted, that because Congress enacted 38 U.S.C. § 106(d), which expressly designates travel to and from inactive duty training as "active military, naval or air service," it must mean that, after Mr. Latsch finished traveling from his weekend service, he was not active again until he started to travel to a period of inactive duty service. Appellee Br. at 23-24. However, this logic misses the point: the legal question is not whether Mr. Latsch was continuously in active "military, naval or air service" status from the time of his weekend deployment until his heart

attack. The legal question is whether the statutory definition of "active military, naval or air service" includes all time a Reservist spends performing his military duties.

When Congress enacted 38 U.S.C. § 106(d), it established that "active military, naval or air service" need not be limited to times when a Reservist is on base, or even times when a Reservist is performing his military duties. Instead, the enactment of § 106(d) shows that "active military, naval or air" service should be construed liberally. Mr. Latsch submits that, because he was performing his military duties at the time of his heart attack, he was in a period of inactive duty training, pursuant to § 101(23)(B), and thus qualifies for benefits.

Even assuming the Veterans Court was correct to hold that Mr. Latsch was not in inactive duty service status at the time of his heart attack, it ignored the fact that Mr. Latsch's evidence stated that his heart attack was caused by his military duties. It was error to hold that a condition must manifest itself during inactive duty training for that condition to have been caused by the inactive duty training.

Furthermore, the Veterans Court also ignored the possibility that Mr. Latsch's inactive duty service *aggravated* his coronary artery disease (thus triggering a heart attack). "A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease." 38 U.S.C. § 1153 (2010). There was no such finding here.

Immediate review of the foregoing issues is necessary to resolve these important federal questions at a time of war.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 5, 2011

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Judgment, United States Court of Appeals for the Federal Circuit, (October 7, 2010) 1a

Appendix B: Judgment, United States Court of Appeals for Veterans Claims, [A1], (October 23, 2009) 3a

Appendix C: Memorandum Decision, United States Court of Appeals for Veterans Claims, [A7-A13], (September 30, 2009) 5a

Appendix D: Order, Board of Veterans' Appeals, [A14-A26], (February 19, 2008) 16a

Appendix E: Letter from Donald N. Gill, M.D., [A46], (August 6, 2003) 32a

Appendix F: Letter from Donald N. Gill, M.D., [A47], (May 26, 2004) 34a

Appendix G: Letter from Charles L. Miller, M.D., F.A.C.C., [A50], (July 27, 2005) 36a

Appendix H: Letter from Charles L. Miller, M.D., F.A.C.C., [A51], (August 2, 2006) 38a

Appendix I: Letter from Don P. Speers, Jr., COL, MC, Commanding, [A52], (August 21, 2006) 40a

Appendix J: Letter from Alan Rozanski, MD, Professor of Medicine, Columbia University College of Physicians and Surgeons, [A53], (November 29, 2006) 42a

Appendix K: Letter from Vincent T. Randazzo, MD, [A54], (January 29, 2007) 45a

Appendix L: Letter from Narayana Swamy, M.D., [A58], (March 28, 2007) 47a

Appendix M: Letter from Don P. Speers, Jr., COL, MC, Commanding, [A59], (April 27, 2007) 49a

Appendix N: Letter from Charles L. Miller, M.D., F.A.C.C., [A60], (May 15, 2007) 51a

Appendix O: Letter from Vincent T. Randazzo, MD, [A61], (May 17, 2007) 53a

Appendix P: Letter from Vincent T. Randazzo, MD, [A65], (July 6, 2007) 55a

Appendix Q: Memorandum from David Lu, MD to Board of Veterans' Appeals, [A66-A67], (August 30, 2007) 57a

Appendix R: Letter from Carrie M. Johnson-Clark, Director, Management and Administration to Ross D. Fletcher, M.D., [A68], (September 13, 2007) 61a

Appendix S: Memorandum from David Lu, MD to Board of Veterans' Appeals, [A69-A70], (August 30, 2007) 63a

Appendix T: Letter from Charles L. Miller, M.D., F.A.C.C., [A71], (November 20, 2007) 67a

Appendix U: Memorandum from David Lu, MD to Board of Veterans' Appeals, [A80-A81], (August 30, 2007) 69a

APPENDIX A

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2010-7042

[Filed October 7, 2010]

ROBERT J. LATSCH, *Claimant-Appellant*,	)
v.	)
ERIC K. SHINSEKI, Secretary of Veterans Affairs, *Respondent-Appellee.*	)

Appeal from the United States Court of Appeals for Veterans Claims in case no. 08-1484, Judge Lawrence B. Hagel.

JUDGMENT

MICHAEL P. PASQUALE, McCarter & English, LLP, of Newark, New Jersey, argued for claimant-appellant.

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent-appellee. With her on the brief were TONY WEST, Assistant Attorney General, JEANNE E. DAVIDSON, Director, and MARTIN F. HOCKEY, JR., Assistant Director. Of counsel was ROBERT C. BIGLER, Trial Attorney. Of counsel on the brief were MICHAEL J. TIMINSKI, Deputy Assistant General Counsel, and CHRISTA A. SHRIBER, Attorney, Office of the General Counsel, United States Department of Veterans Affairs, of Washington, DC.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (GAJARSA, LINN, and Prost, *Circuit Judges*).

AFFIRMED. ***See*** **Fed. Cir. R. 36.**

ENTERED BY ORDER OF THE COURT

/s/Jan Horbaly/S.W.
Jan Horbaly

OCT 07 2010
Date

ISSUED AS A MANDATE: Nov 29 2010

APPENDIX B

Not Published
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No: 08-1484

[Filed October 23, 2009]

ROBERT J. LATSCH, APPELLANT,	)
V.	)
ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS, APPELLEE.	)

JUDGMENT

The Court has issued a decision in this case. The time allowed for motions under Rule 35 of the Court's Rules of Practice and Procedure has expired.

Under Rule 36, judgment is entered this date.

Dated: October 23, 2009 FOR THE COURT:

NORMAN Y. HERRING
Clerk of the Court

By: /s/ Abie M Ngala
Deputy Clerk

Copies to:

Allen E. Falk, Esq.

VA General Counsel (027)

APPENDIX C

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 08-1484

[Filed September 30, 2009]

ROBERT J. LATSCH, APPELLANT,	)
	)
V.	)
	)
ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS, APPELLEE.	)

Before HAGEL, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

HAGEL, *Judge*: Robert J. Latsch appeals through counsel a February 19, 2008, Board of Veterans' Appeals (Board) decision finding that he was not entitled to VA benefits for coronary artery disease. The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a)

and 7266(a) to review the February 2008 decision, and a single judge may conduct that review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). Because the Board did not err in finding that there was no probative evidence linking Mr. Latsch's coronary artery disease to a period of active duty for training, the Court will affirm the February 19, 2008, Board decision.

I. FACTS

Mr. Latsch served on active duty in the U.S. Army during September and October1956. He also served in the Army Reserves with periodic active duty for training from August 1975 to August 1994. He suffered a myocardial infarction[1] in February 1987, during a period of time when he was not on active duty status for training. (R. at 5).

In September 2003, Mr. Latsch applied for entitlement to VA benefits for coronary artery disease. In March 2005, a VA regional office denied his claim, after finding no evidence that his heart disease was incurred in or aggravated by active duty training.

Between 2005 and 2007, Mr. Latch submitted a series of expert opinions linking his 1987 myocardial infarction to his stress level at the time. The first of these opinions came from Dr. Gill, a private physician, who opined that "ongoing stresses related to [Mr.

---

[1] Myocarditis is an inflamation of the muscular walls of the heart. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1240 (31st Ed. 2007) (hereinafter DORLAND'S). In common parlance, a myocardial infarction is a heart attack. *See* Google Health (www.google.com/health/ref/Heart+atack).

Latch's] army reserve, work, [and] travel time were major factors in his ultimate heart attack." Record (R.) at 447. A second opinion from Dr. Gill suggested that "ongoing stresses greatly contributed to Mr. Latsch's subsequent heart attack." R. at 472. Mr. Latsch also submitted a July 2005 opinion from Dr. Charles Miller suggesting that stress must be "considered a substantial contributing cause" of Mr. Latsch's coronary artery disease. R. at 27. In November 2006, Dr. Alan Rozanski of Columbia University opined that psychological stress has been definitively correlated to coronary heart disease.

In August 2007, the regional office provided a VA physical examination conducted by Dr. David Lu. Dr. Lu was asked whether Mr. Latsch's currently diagnosed coronary artery disease was causally related to reserve duty stress. Dr. Lu reported that there is "insufficient evidence" to describe psychological stress as a "significant risk factor" for heart disease. R. at 165. He listed hypertension, diabetes, smoking, hypercholesterolemia, family history, age, and male sex as commonly accepted risk factors. Finally, Dr. Lu opined that, even if stress were a factor in Mr. Latsch's heart attack, its "role is minor in comparison to [Mr. Latsch's] other coronary risk factors, including smoking, family history, and hypercholesterolemia and hypertension." R. at 165.

In April 2007, Colonel Don Speers, M.D., U.S. Army, submitted a letter disagreeing with the August 2007 VA examiner's opinion and suggesting that stress could aggravate coronary artery disease. In May 2007, Mr. Latsch's private physician, Dr. Miller, again opined that Mr. Latch's February 1987 myocardial infarction was substantially related to work stress. In

July 2007, Dr. Vincent Randazzo submitted a letter opinion providing that stress related to Mr. Latsch's Army Reserve duty contributed to his cardiac problems.

In February 2008, the Board issued the decision on appeal, denying Mr. Latsch entitlement to service connection for coronary artery disease. The Board reviewed Mr. Latsch's medical history and the opinions of the various cardiologists linking stress to an increased risk of heart disease. The Board found that, because Mr. Latsch's heart attack did not occur during a period of active duty for training, he was only entitled to VA benefits if his coronary artery disease was aggravated during training. The Board found that the medical opinions of Drs. Gill, Miller, Rozanski, Randazzo, and Speers were less probative than Dr. Lu's opinion in determining whether the disease was aggravated during active duty because none discussed Mr. Latsch's history of hyperlipidemia[2] and hypertension or the stress and physical exertion related to his civilian job. The Board concluded that the VA examiner's opinion was more probative because he identified several commonly accepted risk factors for coronary artery disease in Mr. Latsch's medical record and noted that there was insufficient evidence to link stress to coronary artery disease. The Board also concluded that the VA examiner possessed sufficient credentials to provide an opinion as to the cause of Mr. Latsch's coronary artery disease because he had a speciality certification in internal medicine and a subspeciality certification in cardiovascular

---

[2] Hyperlipidemia is defined as "elevated concentrations of any or all or the lipids in the plasma." DORLAND'S 903.

disease. After discounting the probative value of Mr. Latsch's experts' opinions, the Board found that there was "no medical evidence in the record" actually linking Mr. Latch's stress to aggravation of coronary artery disease during a period of qualifying service. R. at 12.

On appeal, Mr. Latsch argues that the Board erred in assigning more probative value to the VA examiner's opinion than it assigned to the opinion of Dr. Rozanski, who he described as an "eminent specialist." Appellant's Brief (Br.) at 5. He also argues that there was "no plausible basis in the record" supporting the Board's finding that his coronary artery disease was not caused or aggravated by military service. Appellant's Br. at 6. Mr. Latsch contends that the Board decision should be reversed because there was an approximate balance of positive and negative evidence on his underlying claim. Appellant's Br. at 6. He asserts that the Board failed to account for a medical opinion from a VA physician that stress can cause coronary artery disease. Appellant's Br. at 8. Mr. Latsch argues that the Court should remand his claim to the Board for consideration by a panel of "appropriate medical experts." Appellant's Br. at 8.

In response, the Secretary asserts that the Court should find that there was a "plausible basis" in the record for the Board's decision. Secretary's Br. at 4. The Secretary contends that it was not error for the Board to find that the VA examiner was competent to provide an opinion and that this opinion was the most probative evidence as to the cause of Mr. Latsch's coronary artery disease. Secretary's Br. at 4. The Secretary argues that the benefit of the doubt doctrine does not apply here because the evidence was not in

equipoise. Secretary's Br. at 6. Finally, the Secretary asserts that there is no basis upon with the Court could vacate and remand the Board's decision. Secretary's Br. at 7.

II. ANALYSIS

In rendering its decision, the Board is required to provide a written statement of the reasons or bases for its "findings and conclusions[] on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam* 78 F.3d 604 (Fed. Cir. 1996) (table). The Board's assessment of the credibility and weight to be given to evidence is a finding of fact that the Court review under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991); *Gilbert*, 1 Vet.App. at 52.

Because members of the reserve components of the armed forces, except when called to federal service, involve periods of non-active duty, there is special consideration for determining when a claimed disease or injury is service connected. There must be evidence that the disease or injury is directly related to

training.[3] For Mr. Latsch, who served in the Army Reserve, to establish that his coronary artery disease is service connected, there must be evidence showing that he was disabled by disease or injury incurred in or aggravated while he was performing active or inactive duty for training. 38 U.S.C. §§ 101(22), (24), 1110. Thus, his heart attack is simply evidence that he suffered from coronary artery disease, and he must present evidence that the coronary artery disease was incurred in or aggravated during training.

Mr. Latsch argues that the Board lacked a plausible basis in the record to find that "no medical evidence in the record shows or suggests that the [coronary artery disease] had its onset or . . . increased in severity during a period of [active duty training]." R. at 12. Mr. Latsch contends that the Board failed to account for two statements from his private physician, Dr. Gill, when it found that there was "no evidence" directly linking his coronary artery disease to active duty training. Appellant's Br. at 6. In the first statement in question, Dr. Gill opined that "ongoing stresses related to [Mr. Latch's] army reserve, work, [and] travel time were major factors in his ultimate heart attack." R. at 447. In the second statement, Dr. Gill again opined that "ongoing stresses greatly contributed to Mr. Latsch's subsequent heart attack."

---

[3] There are two types of reserve training, active and inactive. Active duty for training means full time duty performed by reservists or National Guard members for training purposes under orders for active duty. 38 U.S.C. §§ 101(22)(B), (C). Inactive duty for training means non-full time duty for reservists as prescribed by the Secretary of each military department (commonly in the form of weekend drills and two-week yearly training periods). 38 U.S.C. § 101(23)(A).

R. at 472. Mr. Latsch's argument that the Board did not account for Dr. Gill's opinions is not supported by the record. The Board considered Dr. Gill's opinions, but determined that they were of minimal probative value because the doctor did not discuss Mr. Latsch's "history of hyperlipidemia and hypertension, or the stress and physical exertion associated with [his] civilian job." R. at 11.

The issue here is not whether Mr. Latsch had coronary artery disease. Because all the physicians agree that he does have coronary artery disease, the issue is whether Mr. Latch's coronary artery disease was incurred or aggravated during active or inactive duty for training. The Board is permitted to analyze the credibility and probative value of the evidence before it, which is what it did in this case. *See Caluza*, 7 Vet.App. at 506. After the Board discounted Dr. Gill's and several other physicians' opinions, no probative evidence remained linking Mr. Latsch's coronary artery disease to his active duty training. Thus, the Court finds that there is a probable basis in the record for the Board's statement that no medical evidence supported Mr. Latsch's claim.

To the extent that Mr. Latsch argues that the Board erred by favoring the VA examiner's opinion over that of "an eminent specialist," the Board is permitted to favor one expert's opinion over another provided that it gives an adequate statement of its reasons and bases for so doing. *See Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992). Thus, the question is not which expert is "more qualified," but whether a particular expert was competent to provide an opinion. The credibility of an expert is a finding of fact to be made by the Board. *See Layno v. Brown*, 6

Vet.App. 465, 469 (1994) (finding that the weight and credibility of evidence "is a factual determination going to the probative value of the evidence to be made after the evidence has been admitted"); *see also Washington v. Nicholson*, 19 Vet.App. 362 (2006) (holding that it is the Board's responsibility to determine the appropriate weight to be given to evidence). Here, the Board found that Dr. Lu was qualified to opine as to the etiology of Mr. Latsch's coronary artery disease and as to the likelihood that it was caused by active or inactive duty for training. R. at 12. Mr. Latsch offers no evidence to rebut the finding that Dr. Lu is qualified; instead he asserts that other specialists had better credentials. Because Mr. Latsch has not asserted that Dr. Lu was not qualified, the Court finds that Mr. Latsch failed to carry his burden of establishing that the Board was clearly erroneous in assessing the credibility of Dr. Lu's opinion. *See Layno*, 6 Vet.App. at 469; *Wood*, 1 Vet.App. at 93.

Mr. Latsch asserts that the Board failed to account for probative medical evidence because it did not address a March 2007 VA examiner's opinion that "[s]tress can precipitate myocardial infarction." R. at 161. Mr. Latsch takes the physician's statement out of context. In full, the March 2007 VA examiner stated that "[s]tress can precipitate myocardial infarction. However whether prolonged stress alone can produce coronary artery disease in a person without other risk factors is not well established." R. at 161. The VA physician further opined that "it is unlikely that the veteran's currently diagnosed coronary artery disease is causally related to the stress during his period of reserve duty." R. at 161. Viewed in context, the March 2007 VA examiner's opinion is not favorable medical

evidence, and the Board did not err in failing to account for the opinion. *See Caluza*, 7 Vet.App. at 506.

Finally, Mr. Latsch contends that the Board erred in failing to apply the benefit of the doubt doctrine because there was an approximate balance of positive and negative evidence relating his heart disease to service. Under 38 U.S.C. § 5107(b), "when there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." The determination that there is an approximate balance of positive and negative evidence is a finding of fact by the Board. *Hayes v. Brown*, 5 Vet.App. 60, 69 (1993). Where the preponderance of the evidence is against an appellant's claims, "the benefit of the doubt doctrine does not apply." *Schoolman v. West*, 12 Vet.App. 307, 311 (1999). Here, the Board found that there was no probative evidence demonstrating that Mr. Latsch's coronary artery disease was incurred or aggravated during a period of active duty training. R. at 12. Additionally, the Board determined that the most probative etiological evidence was the July 2005 VA examiner's opinion that Mr. Latsch's coronary artery disease could be attributed to his hypertension and hypercholesterolemia, and not to active duty stress. R. at 12. Because the Board found that the preponderance of the evidence was against Mr. Latsch's claim, the Court finds that the Board did not err in failing to apply the benefit of the doubt doctrine. *Schoolman*, 12 Vet.App. at 311.

Because the Court finds no error by the Board, Mr. Latsch's argument that his claim should be addressed by a panel of experts will not be addressed. Based on

the above discussion, the Court will affirm the Board's decision.

III. CONCLUSION

On consideration of the foregoing, the February 19, 2008, Board decision is AFFIRMED.

DATED: September 30, 2009

Copies to:

Allen E. Falk, Esq.

VA General Counsel (027)

APPENDIX D

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

DOCKET NO. 05-15 601
C 28 250 142

[Filed February 19, 2008]

IN THE APPEAL OF)
ROBERT J. LATSCH)
)

On appeal from the Department of Veterans Affairs
Regional Office in Newark, New Jersey

THE ISSUE

Entitlement to service connection for coronary artery disease (CAD).

REPRESENTATION

Appellant represented by: New Jersey Department of Military and Veterans' Affairs

WITNESS AT HEARINGS ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

K. R. Fletcher, Counsel

INTRODUCTION

The appellant is a veteran who served on active duty from September 6, 1956 to October 16, 1956. Thereafter, he had service in the Army Reserves from August 1975 to August 1994 (with periodic active duty for training (ACDUTRA) and inactive duty for training (INACDUTRA)). This matter is before the Board of Veterans' Appeals (Board) on appeal from a March 2004 rating decision by the Newark, New Jersey Department of Veterans Affairs (VA) Regional Office (RO). In September 2005, a Travel Board hearing was held before the undersigned; a transcript of this hearing is of record. In February 2007 and July 2007, the Board referred the case to the Veterans Health Administration (VHA) for advisory medical opinions.

In December 2006, April 2007, July 2007, September 2007, November 2007 and December 2007, the veteran submitted additional evidence that was not reviewed by the RO. However, in statements received by the Board in December 2006, April 2007 and January 2008, he waived RO consideration of the additional evidence, permitting the Board to consider such records in the first instance. *See* 38 C.F.R. § 20.1304(c). Hence, the additional evidence is being considered.

FINDINGS OF FACT

1. CAD was not manifested during the veteran's period of active duty service from September 1956 to October 1956, and is not shown to be related to this period of service.

2. There is no competent evidence of the onset of cardiovascular disability during a period of ACDUTRA; a cardiac event (such as heart attack or stroke) on ACDUTRA or INACDUTRA is not shown; and it is not shown that CAD increased in severity during any specific period of ACDUTRA.

CONCLUSION OF LAW

Service connection for CAD is not warranted. 38 U.S.C.A. §§ 101(24), 1110, 1131, 1153, 5107 (West 2002 & Supp. 2007); 38 C.F.R. §§ 3.303, 3.304, 3.306 (2007).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Veterans Claims Assistance Act of 2000 (VCAA)

The VCAA, in part, describes VA's duties to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126; 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a). The VCAA applies to the matter being addressed.

Upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant and his or her representative, if any, of any

information, and any medical or lay evidence, that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002). Proper VCAA notice must inform the claimant of any information and evidence not of record (1) that is necessary to substantiate the claim; (2) that VA will seek to provide; (3) that the claimant is expected to provide; and (4) must ask the claimant to provide any evidence in his or her possession that pertains to the claim. 38 C.F.R. § 3.159(b)(1). VCAA notice should be provided to a claimant before the initial unfavorable agency of original jurisdiction decision on a claim. *Pelegrini v. Principi*, 18 Vet. App. 112 (2004).

The veteran was advised of VA's duties to notify and assist in the development of this claim in a December 2003 letter, prior to the initial rating decision. This letter explained the evidence necessary to substantiate his claim, the evidence VA was responsible for providing, and the evidence he was responsible for providing. The December 2003 letter also specifically advised the veteran to submit any pertinent evidence in his possession. While he was not advised of the criteria governing effective dates of awards, he is not prejudiced here by lack of such notice (*see Dingess/Hartman v. Nicholson*, 19 Vet. App. 473, 490-91 (2006)). This is because the Board concludes below that the preponderance of the evidence is against the claim of service connection for CAD; therefore, any questions as to the rating or effective date to be assigned are moot.

Regarding the duty to assist, VA has obtained the veteran's service medical records (SMRs) and records of pertinent VA and private medical treatment.

Furthermore, in 2007, the Board sought a VHA medical advisory opinion from a cardiology expert. The Board notified the veteran of this opinion and provided him with a copy of the opinion. He was notified that he had 60 days to submit any additional evidence or argument in support of his claim. Subsequently, he submitted additional argument and evidence and waived RO consideration of the additional evidence (*see* January 2008 letter from the veteran), permitting the Board to consider such records in the first instance. *See* 38 C.F.R. § 20.1304(c). The Board is satisfied that the RO has complied with VA's duty to assist the veteran in the development of the facts pertinent to his claim. He is not prejudiced by the Board's proceeding with appellate review of the merits of the claim at this time.

II. Service Connection

Service connection may be granted for disability resulting from personal injury suffered or disease contracted during active service, or for aggravation of a pre-existing injury suffered, or disease contracted, during such service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303(a). Service connection may also be granted for a disease initially diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d). Active military, naval, or air service includes any period of ACDUTRA during which the individual concerned was disabled from a disease or injury incurred or aggravated in the line of duty, and any period of INACDUTRA during which the individual concerned was disabled from an injury incurred or aggravated in the line of duty (to include from acute myocardial

infarction, a cardiac arrest or a cerebrovascular accident occurring during such training). 38 U.S.C.A. § 101(24).

Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary. The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107; *see also Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). To deny a claim on its merits, the evidence must preponderate against the claim. *Alemany v. Brown*, 9 Vet. App. 518, 519 (1996), *citing Gilbert*, 1 Vet. App. at 54.

The veteran had active service from September 6, 1956 to October 16, 1956. His SMRs for this period of service are silent for complaints or findings related to CAD. He also had service in the Army Reserves from August 1975 to August 1994 (with periodic ACDUTRA/INACDUTRA). The evidence of record shows that he suffered a myocardial infarction on February 3, 1987; he was not on active duty status at that time.

The evidence of record shows that the veteran was employed as a material handler in 1987 (when he suffered his heart attack and CAD was diagnosed and surgically treated (coronary artery bypass grafting (CABG)). In 2000, he was employed by the New Jersey Department of Corrections.

The medical evidence of record also includes: private medical records which note the veteran's complaints of severe chest pain in February and March 2000 with subsequent cardiac catheterization in March 2000; a May 2000 statement in which Dr. C.P. notes that the veteran's civilian job involved a great deal of mental stress and physical exertion, and therefore, because of his cardiac problems, it would be inappropriate for him to continue to work; and an April 2000 letter from the State of New Jersey, awarding the veteran disability retirement benefits.

Dr. D.N.G. opined in August 2003 and May 2004 that the major ongoing stresses related to the veteran's reserve duties and travel time contributed to his heart attack.

In March 2005, a VA cardiologist opined that the veteran's cardiac problems were not caused by his military service. Rather, underlying risk factors, including high cholesterol (reportedly 237 mg% at the time of his heart attack), were to blame. Moreover, the VA cardiologist stated that job strain was not related to the prevalence and outcome of coronary artery disease.

In July 2005, Dr. C.L.M. opined that while the veteran had some evidence of mild hyperlipidemia, this was unlikely the only cause of his cardiac problems. He opined that the veteran's high stress level should be considered a substantial contributing cause to his coronary artery disease.

At the September 2005 Travel Board hearing, the veteran maintained that the severe stress of his reserve service, to include a 2 ½ hour drive to and from

his home and his duty station, the stress of his reserve duties, and his failure to receive timely promotions because of administrative moves and reorganizations, caused his heart attack and CAD.

In August 2006, Col. D.P.S. noted that after reviewing the medical records and oral and written documentation from the veteran's Reserve service in 1987, he supports the veteran's contention that he was under a high degree of stress during the months leading up to his myocardial infarction. Col. D.P.S. also opined:

> In addition, current medical literature seems to clearly support the contributory role of job related stress in the evolution and progression of atherogenic ischemic myocardial disease.
>
> In light of this, [the veteran's] contention that job stress during performance of his military duties was an exacerbating factor of his myocardial infarction in February of 1987 is extremely plausible.

In November 2006, Dr. A.R. opined that various forms of psychological stress have been definitively correlated with the occurrence and progression of coronary artery disease. He further opined that the veteran was adversely affected by perceived job strain.

In January 2007 and May 2007, Dr. V.T.R. opined that the stress that the veteran experienced while in the reserves was a contributing factor in the veteran's coronary artery disease and the progression of same.

Pursuant to the Board's referral of this case for a VHA medical opinion, in March 2007 a VA cardiologist reviewed the veteran's claims folder and opined:

> Stress can precipitate myocardial infarction. However whether prolonged stress alone can produce coronary artery disease in a person without other risk factors is not well established.
>
> It is as likely as not that the veteran suffered a heart attack from prolonged stress. However it is unlikely that the veteran's currently diagnosed coronary artery disease is causally related to the stress during his period of reserve duty.

In April 2007, Col. D.P.S. disagreed with the conclusion that the veteran's coronary artery disease is unlikely to be causally related to the stress he experienced during his reserve duty.

In May 2007, Dr. C.L.M. opined that stress must be considered an oncoming (on-going) causative factor in the veteran's heart disability.

In July 2007, Dr. V.T.R. stated that he felt that stress can play a role in promoting CAD independent of other risk factors. He added that the veteran also has a history of hypercholesterolemia, and stated that stress can promote CAD with this setting as well. He concluded that the veteran's contention that stress contributed to his cardiac problem is "reasonable."

Pursuant to the Board's referral of this case for a VHA medical opinion, in August 2007 a VA cardiologist

reviewed the veteran's claims folder and answered the following directive from the Board: provide a more detailed medical opinion as to the likelihood (i.e., very likely, as likely as not, or highly unlikely) that the veteran's currently diagnosed CAD is causally related to the "stress" he contends was associated with his periods of reserve duty.

In response, the VA cardiologist noted (in a September 2007 revised opinion):

> Despite published literature suggesting a correlation between psychosocial stress and the development of [CAD] and adverse cardiac events; it remains unclear as to the clinical significance of "psychosocial stress" relative to the known major coronary risk factors. Drs Lavie and Milani from the Ochsner Clinic found in their studies that "patients with adverse behavior factors generally had other adverse CAD risk profiles."
>
> Psychosocial stress and personality type (Type A) haven (sic) been examined extensively, but there is insufficient evidence to link them directly as a significant risk factor for atherosclerotic heart disease. The commonly recognized and accepted coronary risk factors include hypertension, diabetes, smoking, hypercholesterolemia, family history, age, and male sex.
>
> Of all the physicians who provided supporting letters for [the veteran], Dr. [A.R.] is most credentialed through his research in the field of psychosocial stress. Dr. [A.R.] states more

definitively of the correlation between psychosocial stress and the occurrence and progression of [CAD], but other researchers are more cautious in their opinion due to lack of definitive studies. In the mean time, [a] practicing cardiologist can only say that there seems/suggests/or appears to be a correlation between stress and [CAD].

Stress is unavoidable in our society. There are work stress, home stress, and financial stress. Individual differences in response to stress, either environmental and or psychosocial, suggest a more complex, biological, environmental, and psychosocial interaction. It has been suggested that an individual's underlying personality and social makeup are more important in dictating his response and reaction to outside stress. People in highly stressful jobs do not necessarily develop [CAD].

It is my opinion that there is insufficient evidence to establish causality between stress and [CAD]. At this time, it is my opinion that psychosocial stress is unlikely to cause [CAD]. As Dr. CLM stated, stress may be an "up and coming" risk factor, but it remains controversial. Even IF stress played a role in [the veteran's] heart attack, I believe its role is minor in comparison to [the veteran's] other coronary risk factors. In his medical record, it is documented that [the veteran] has "a history of hypercholesterolemia and hypertension (Medical Health Center, Dr CP in 6/2000). [The veteran] is typical of patients in Drs Lavie's and Milani's studies with multiple CAD risk factors.

In a November 2007 letter, Dr. C.L.M. indicated that he had reviewed the 2007 VHA opinion. He took issue with the VHA physician's characterization of his medical opinion. He never said that stress was an "up and coming" risk factor; rather, he said it was an "oncoming" (meaning "on-going") risk factor. In addition, he never characterized this opinion was "controversial." He stated that he treated the veteran when he had his initial myocardial infarction in 1987, and continues to feel that "stress has played a major role" in the veteran's CAD.

The other evidence of record includes internet and magazine articles which discuss the relationship between stress and various physical disabilities, including heart disease.

As was previously noted, the veteran's SMRs do not show that CAD was manifested during his period of active service (September 1956 to October 1956). The Board therefore finds that the preponderance of the evidence is against a finding that CAD became manifest during that period of active service and persisted. Furthermore, it is neither alleged, nor suggested by any evidence of record, that CAD is somehow otherwise directly related to (i.e., incurred in or aggravated by) this period of service. Consequently, service connection for CAD based on such findings is not warranted.

The veteran also had service in the Army Reserves from August 1975 to August 1994. As was previously noted, service connection may be established for disease incurred on a period of ACDUTRA. The veteran suffered a myocardial infarction on February 3, 1987; however, he was not on active duty status at

that time. Thereafter, he has received ongoing treatment for CAD.

Regarding service connection for CAD based on a theory of entitlement that such disease is related to ACDUTRA or INACDUTRA, some discussion of governing law and regulations is necessary at the outset. First of all, it is noteworthy that INACDUTRA is considered active (and thereby qualifying for service connection) military, naval, or air service if the individual was disabled from an **injury** during such period of service (and regarding cardiovascular disease specifically, if the individual suffered an acute myocardial infarction, a cardiac arrest or a cerebrovascular accident during such training). *See* 38 U.S.C.A. § 101(24)(C)(ii). It is neither shown by the record, nor alleged, that the veteran suffered an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident during any period of INACDUTRA. Consequently, it is not shown that he has disability due to injury during INACDUTRA which may be service-connected.

Regarding **ACDUTRA,** such service is considered active (and qualifying for service connection) military, naval or air service for "**any period**" of such service during which the individual concerned was disabled from a disease or injury incurred or aggravated in the line of duty. In the instant case, it has not been alleged that the veteran's CAD is due to disease or injury incurred or aggravated during any specific **period** of ACDUTRA. Notably, the CAD was apparently first diagnosed when he suffered a heart attack in 1987. As was noted above this was not during a period of ACDUTRA. Since there is no period of ACDUTRA prior to the veteran's 1987 heart attack implicated (by

allegation or any evidence in the record) in the onset of his CAD, there is no basis for finding that the CAD was incurred during a period of ACDUTRA.

The veteran maintains that the severe stress of his reserve service, to include a 2 ½ hour drive to and from his home and his duty station, the stress of his reserve duties, and his failure to receive timely promotions because of administrative moves and reorganizations, caused his heart attack and CAD. This allegation raises the question of whether the veteran's CAD was aggravated during a period ACDUTRA (because the veteran continued serving in the Reserves after his 1987 heart attack and initial diagnosis of CAD, and thus the CAD is shown to have pre-existed any periods of ACDUTRA after the heart attack). Significantly, aggravation may not be conceded where the disability underwent no increase in severity during service. *See* 38 C.F.R. § 3.306 (b).

Substantial medical opinion evidence addressing the etiology of the veteran's CAD has been associated with the record; if such evidence established the onset or increase in severity of CAD during a period of ACDUTRA, it would be critical. Drs. D.N.G., C.L.M., A.R. and V.T.R., and Col. D.P.S. all conclude that the ongoing stress related to the veteran's Reserve duties contributed to the veteran's CAD. Notably, none of these physicians discussed the veteran's history of hyperlipidemia and hypertension, or the stress and physical exertion associated with the veteran's civilian job. Conversely, a 2007 advisory VHA expert opined that it was not likely that the stress associated with the veteran's Reserve service caused his CAD. This opinion is based on a review of the veteran's entire pertinent medical history, including his SMRs and

post-service medical evidence as noted above, as well as the private medical evidence of record. The consulting expert provided a detailed explanation of the rationale for his conclusion, as noted above. Of note, the expert opined that there was insufficient evidence to establish causality between stress and CAD, noting that people in highly stressful jobs do not necessarily develop CAD. The consulting expert identified commonly recognized and accepted coronary risk factors, and noted the veteran's history of two of these - hypertension and hypercholesterolemia. In light of the foregoing, the Board finds the VHA opinion the most probative and persuasive evidence in this matter. (The Board notes the veteran's assertion that the VHA expert lacks the credentials to offer an opinion in this matter because, unlike Drs. C.L.M. and A.R., he is not a board certified cardiologist (*see* statement from the veteran received December 2007). However, the Board notes that according to the American Board of Internal Medicine, the VHA expert has a specialty certification in internal medicine and a subspecialty certification in cardiovascular disease. For the reasons noted above, the Board has found the VHA expert's opinion probative and persuasive in the matter of the etiology of the veteran's CAD.)

Regardless of any finding as to the etiology of the veteran's CAD, i.e., whether it is stress related (and specifically related to stress in the line of duty), no medical evidence in the record shows or suggests that the CAD had its onset or (specifically for ACDUTRA periods after the veteran's heart attack and diagnosis of CAD) increased in severity during a period of ACDUTRA. It must be emphasized that unless such is shown, the periods of ACDUTRA are not considered active military, naval or air service (and not qualifying

service for service connection purposes). *See* 38 U.S.C.A. §§ 101(24)(B); 1110.

The Board has considered the benefit of the doubt doctrine; as the preponderance of the evidence is against the veteran's claim, that doctrine does not apply.

ORDER

Service connection for COD is denied.

/s/George R. Senyk
George R. Senyk
Veterans Law Judge, Board of Veterans' Appeals

APPENDIX E

DONALD N. GILL, M.D.
VINCENT T. RANDAZZO, M.D.
MEMBERS OF INTEGRATED MEDICINE
ALLIANCE, PA
248 BROAD STREET
RED BANK, NEW JERSEY 07701
732-530-3433 FAX: 732-758-1953

INTERNAL MEDICINE

August 6, 2003

Robert Latsch
352 Campbell Ave.
Belford, N.J. 07718

To Whom it May Concern:

Mr. Robert Latsch, [REDACTED]/39 has been a patient under my care since 1987. At that time, he was hospitalized at Riverview Hospital, Red Bank, N.J. with an acute myocardial infarction. On 2/11/87, he had bypass surgery. Subsequently, he became permanently disabled in October of 2000.

At the time of his acute myocardial infarction, he was an active member of the U.S. Army Reserves. His reserve unit was changed, and he was forced to travel to Predricktown, N.J. for his reserve duty. That was 2 ½ hours of travel time. There was a further change and he was transferred to the 198th unit at Fort

Wadsworth, Staten Island. His duties as mess sargeant and being in new positions in new units put severe increased stress on the patient. Ultimately, he sustained the heart attack and subsequent bypass surgery, and he has been a cardiac patient ever since. He has since been on disability.

The major ongoing stresses related to his army reserve, work, travel time were major factors in his ultimate heart attack.

Sincerely,

/s/Donald N. Gill, M.D.
Donald N. Gill, M.D.

DNG/lr

APPENDIX F

DONALD N. GILL, M.D.
VINCENT T. RANDAZZO, M.D.
MEMBERS OF INTEGRATED MEDICINE
ALLIANCE, PA
248 BROAD STREET
RED BANK, NEW JERSEY 07701
732-530-3433 FAX: 732-758-1953

INTERNAL MEDICINE

May 26, 2004

Robert Latsch
352 Campbell Ave.
Belford, N.J. 07718

To Whom it May Concern:

Robert Latsch has been a patient under my care since 1987. At that time he was hospitalized with an acute myocardial infarction. He had bypass surgery 2/11/87. Subsequently, he had a PTCA with stent 3/00.

He had a recent nuclear stress test which did show greater ST depressions than on a stress test done 3/4/03. This was felt to be evidence for mild ischemia for this level of exercise. Because he's on a beta blocker, he could not reach his target heartrate and subsequently a nuclear test was normal, but no definite diagnosis could be made due to the heart rate.

The patient has had a history of excessive stress while in the Army reserve. He had his reserve unit changed, and was forced to travel to Fredricktown Maryland for his reserve duty. Two and a half hours of travel time was needed. Further change, he was transferred to the 198th unit at Fort Wadsworth Staten Island. Again, great travel time.

Because of administrative alteration, he was unable to have promotions which also added to his stress.

These ongoing stresses greatly contributed to Mr. Latsch's subsequent heart attack.

Sincerely,

/s/Donald N. Gill, M.D.
Donald N. Gill, M.D.

DNG/lr

APPENDIX G

CHARLES L. MILLER, M.D., F.A.C.C.
Integrated Medicine Alliance, PA
1048 BROAD STREET, SUITE 2
SHREWSBURY, NEW JERSEY 07702
(732) 542-2124

BOARD CERTIFIED, INTERNAL MEDICINE BOARD CERTIFIED, CARDIOVASCULAR DISEASES CERTIFIED, CERTIFICATION BOARD OF NUCLEAR CARDIOLOGY

PRACTICE LIMITED TO DIAGNOSTIC CARDIOLOGY

7/27/2005

RE: Robert Latsch SS# [REDACTED]-0277

To whom it may concern:

Mr. Robert Latsch has asked me to review his medical history in light of his disability determination.

I have not actively treated Mr. Latsch but have discussed his case with his physician, Dr. Donald Gill, have reviewed many of his medical records and I have interviewed Mr. Latsch in some detail.

It is my opinion that, although Mr. Latsch does have some evidence of mild hyperlipidemia (total cholesterol of 237 mg%), I feel it is very unlikely the only cause of his problems and I do believe that the stress in his life shoud be considered a substantial contributing cause

to his coronary artery disease. I am aware that, due to the nature of stress, it is a difficult entity to quantiate, as opposed to other risk factors such as hyperlipiedmia, smoking and hypertension. However, I also believe that the preponderance of the cardiology community concur that stress is a definite risk factor in many patients with coronary artery disease, and it appears that Mr. Latsch's stress level was very high.

I hope that this information will be considered in Mr. Latsch's case.

Sincerely,

/s/Charles L. Miller
Charles L. Miller, M.D., F.A.C.C.

APPENDIX H

CHARLES L. MILLER, M.D., F.A.C.C.
Integrated Medicine Alliance, PA
1048 BROAD STREET, SUITE 2
SHREWSBURY, NEW JERSEY 07702
(732) 542-2124

BOARD CERTIFIED, INTERNAL MEDICINE BOARD CERTIFIED, CARDIOVASCULAR DISEASES CERTIFIED, CERTIFICATION BOARD OF NUCLEAR CARDIOLOGY

PRACTICE LIMITED TO DIAGNOSTIC CARDIOLOGY

8/2/2006

RE: Robert Latsch SS# [REDACTED]-0277

To whom it may concern:

Mr. Robert Latsch has again asked me to review his medical history in light of his disability determination in follow up to my letter of 7/5/2005.

On reviewing Mr. Latsch's case again, and in light of my knowledge of his cardiac history, it is my considered opinion that, although Mr. Latsch does have mild hnypercholesterolemia, emotional stress has played a significant role in the causation of his cardiac problems and stress contines to be a major contributing factor in his life. In my experience, stress is considered a major risk factor in the causation of

coronary artery disease and I feel the medcial community in general agrees with this premise, even though stress is not a quatifiable factor.

I would respectfully request that Mr. Latch's case be re-evaluated with the emphasis that the stress in his life has been a major risk factor in causing his coronary artery disease.

I hope that this information will be helpful in the consideration of Mr. Latsch's case.

Sincerely,

/s/Charles L. Miller
Charles L. Miller, M.D., F.A.C.C.

APPENDIX I

DEPARTMENT OF THE ARMY
HEADQUARTERS,
PATTERSON ARMY HEALTH CLINIC
FORT MONMOUTH, NEW JERSEY
07103-5500

REPLY TO
ATTENTION
OF

MCXS-Z 21 August 2006

Memorandum for Department of Veterans Affairs

Subject: Robert Latsch's Disability Claim

I had the opportunity to discuss Mr. Latsch's (SSN [REDACTED]-0277) concerns at some length with him. On the basis of his request I reviewed his medical record, oral and written documentation of his situation in the reserves in the Fall and Winter of 1987, and written supporting documentation from SFC Spengeman (ret), SSG Leuttchau (ret), CDR Murphy, Donald Gill MD, and Charles Miller MD.

I feel that Mr. Latsch's contention that he was under a high degree of stress during the months leading up to his myocardial infarction is fairly well established.

In addition, current medical literature seems to clearly support the contributory role of job related stress in the evolution and progression of atherogenic ischemic myocardial disease.

In light of this, Mr. Latsch's contention that job stress during performance of his military duties was an exacerbating factor of his myocardial infarction in February of 1987 is extremely plausible.

Given the above, the conclusion that Mr. Latsch's subsequent disability should be considered service aggravated is at worst reasonable and at best fairly compelling. When primary events occur while not on duty it is always extremely difficult to determine what if any unique role prior military service played. Regardless, military duty is frequently uniquely stressful compared to civilian activities, even in a garrison environment.

A careful reconsideration of the VA decision made in 2005 certainly seems warranted.
Thank you for your attention to this matter.

/s/DON P. SPEERS, JR.
DON P. SPEERS, JR.
COL, MC
Commanding

APPENDIX J

University Hospital of
Columbia University
College of Physicians & Surgeons

St. Luke's-Roosevelt
Hospital Center
St. Luke's Division
1111 Amsterdam Avenue
New York, NY 10025

To Whom It May Concern:

November 29, 2006

I am a full time clinical and academic cardiologist, and a Professor of Medicine at the Columbia University College of Physicians and Surgeons, who has studied the effects of stress on heart disease for many years.

At the request of Mr. Robert Latsch, I have reviewed his claim for disability, the summaries of his evaluations by various physicians and the summary of the response to claims by the Department of Veterans Affairs. I also have discussed Mr. Latsch's work history with him.

I have noted that the Medical staff or the Department of Veterans Affairs denied Mr. Latsch's claim asserting that "job strain is not related to the prevalence or

outcome of coronary artery disease. Job strain has never been a predictor of cardiac events."

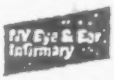
My clinical impression is that Mr. Latsch did suffer from perceived job strain, and that he was adversely affected by it. Various forms of psychological stress have now been definitively correlated with the occurrence and progression of coronary artery disease and the acceleration of cardiac events. These include chronic depression and chronic stress. The most widely studied chronic stressor has been work stress. Pathophysiological studies have linked work stress to the activation of both the sympathetic nervous system and the hypothalamic pituitary cortical axis, with resultant increased levels of serum, urinary and salivary cortisol, and norepinephrine. Patients under increased job stress have been noted to have increased levels of hypertension, greater left ventricular mass, accelerated atherosclerosis, and premature death, as well as more cardiac events. I include for your information some classic references that support the association of job stress with these conditions. Thus, the statement that job stress is unfounded and incorrect.

I hope this additional information is useful to all parties concerned in the further evaluation of Mr. Latsch's claim for disability.

Sincerely,

/s/Alan Rozanski, MD
Alan Rozanski, MD
Professor of Medicine
Columbia University College
of Physicians and Surgeons

Continuum Health Partners, Inc.



APPENDIX K

VINCENT T. RANDAZZO, MD
248 BROAD STREET
RED BANK, NEW JERSEY 07701
732-530-3433
FAX: 732-758-1953

January 29, 2007

Re: Latsch, Robert
DOB: [REDACTED]/39

To Whom It May Concern:

I am now Mr. Robert Latsch's primary care physician since Dr. Gill, his previous doctor, has retired.

Mr. Latsch is a 67 year old white man who had an acute myocardial infarction back in 1987. He subsequently had coronary artery bypass surgery, followed by an angioplasty with sent in March 2000. The patient contends that he experienced excessive stress while in the army reserves and this played a significant role in his sustaining a myocardial infarction.

I feel stress has been felt to be a contributing factor in coronary artery disease and progression of same. And hence. I feel that Mr. Latsch's contention that the stress contributed to his myocardial infarction is

reasonable. Should you have any questions please contact me.

Sincerely yours,

/s/ Vincent T. Randazzo, MD
Vincent T. Randazzo, MD

VT/bz

APPENDIX L

11/29/2007 09:00 FAX 7326711100 STAPLES 011

DEPARTMENT OF VETERANS AFFAIRS
VA Gulf Coast Veterans Health Care System
400 Veterans Avenue
Biloxi, MS 39531

March 28, 2007 In Reply Refer To:

C&P Examination done on Robert J. Latsch
No examination done - only for opinion
Done by Narayana Swamy, M.D.
Done at Biloxi, VA on March 20, 2007

Re: Robert J. Latsch
SSN: [REDACTED]-0277
DOB: [REDACTED], 1939

I have reviewed all available records on Mr. Latsch including various reports and reports and opinions from other physicians.

Mr. Latch suffered an acute myocardial infarction on 1987 followed by CABGS. In 2000 because of continual chest pains he had another cardiac cath done with subsequent coronary angioplasty.

Stress can precipitate myocardial infarction. However whether prolonged stress alone can produce coronary artery disease in a person without other risk factors is not well established.

Opinion: It is as likely as not that the veteran suffered a heart attack from prolonged stress. However it is unlikely that the veteran's currently diagnosed coronary artery disease is causally related to the stress during his period of reserve duty.

/s/ Narayana Swamy
Narayana Swamy, M.D.

APPENDIX M

DEPARTMENT OF THE ARMY
HEADQUARTERS, PATTERSON ARMY HEALTH CLINIC
FORT MONMOUTH, NEW JERSEY
07703-5500

REPLY TO
ATTENTION
OF

27 April 2007

Memorandum for Department of Veterans Affairs

Subject: Robert Latsch's Disability Claim

Mr. Latch requested that I review the memo dated 28 March 2007 from Or. Swamy, MD.

I agree with the conclusion that there is a reasonable likelihood that Mr. Latsch's MI in 1987 was related to job stress. On the basis of my review of the current literature and my understanding of the definition of service aggravation, I disagree with Dr. Swamy's conclusion that the Veteran's currently diagnosed coronary artery disease is unlikely to be causally related to the stress during his period of reserve duty.

Although an increased risk between stress and MI seems to be fairly well established the exact mechanisms of that linkage is poorly understood.

There seems to be credible evidence for both a relatively acute risk on the basis of effects on platelet function, hormone levels, and blood pressure response, and as well a chronic component on the basis or exacerbation of the metabolic syndrome among other factors. As an example of a similar scenario; the currently established standards support the finding of service aggravation on the basis of the service lifestyle in cases of exacerbation of Type II Diabetes. Regardless it seems very difficult to effectively argue that an Acute MI does not constitute a legitimate service aggravation (on the basis of a permanent acceleration of the natural history of the disease process) of Mr. Latsch's coronary artery disease.

This case seems to afford the opportunity for careful review and clarification of the VA's approach to the role of job stress in the evolution of atherosclerotic cardiovascular disease. Thank you for your consideration.

/s/ Don P. Speers, Jr.
DON P. SPEERS, J.R.
COL, MC
Commanding

APPENDIX N

11/29/2007 09:00 FAX 7326711100 STAPLES 008

CHARLES L. MILLER, M.D., F.A.C.C.

INTEGRATED MEDICINE ALLIANCE, PA
1048 BROAD STREET, SUITE 2
SHREWSBURY, NEW JERSEY 07702
(732) 542-2124

BOARD CERTIFIED, INTERNAL MEDICINE
BOARD CERTIFIED, CARDIOVASCULAR DISEASES
CERTIFIED, CERTIFICATION BOARD OF NUCLEAR CARDIOLOGY

PRACTICE LIMITED TO DIAGNOSTIC CARDIOLOGY

5/15/2007

To: Department of Veterans Affairs

RE: Robert Latsch SS# [REDACTED]-0277

To whom it may concern:

Once again, Mr. Latsch has asked me to review his case for disability determination. I have previously sent correspondence in 2005 and 2006.

I have most recently reviewed letters from Dr. Alan Rozanski, a recognized expert in the field of stress related coronary artery disease, Col. Don P. Speers,

Jr., U.S. Army Medical Corps and Dr. Narayana Swamy.

There appears to be considerable agreement that Mr. Latsch's initial myocardial infarction was substantially related to work related stress. However, there is some disagreement as to how much effect the stress has had on his continuing coronary artery disease.

I agree wirh Dr. Rozanski and Col. Speers that stress must be considered an oncoming causative factor in Mr. Latsch's heart condition. I feel if he had not had the first work-related episode that his future health would have been significantly better and that he very likely would not have had the significant on-going problems that he now has.

I feel his case for disability needs to be reviewed in light of his total on-going history of coronary artery problems which cannot be isolated to individual or isolated events.

Thank you for your consideration of this matter.

Sincerely,

/s/ Charles L. Miller
Charles L. Miller, M.D., F.A.C.C.

APPENDIX O

VINCENT T. RANDAZZO, MD
248 BROAD STREET
RED BANK, NEW JERSEY 07701
732-530-3433
FAX: 732-758-1953

May 17, 2007

Re: Latsch, Robert
DOB: [REDACTED]/39

To Whom It May Concern:

Mr. Latsch has requested that I write you again in reference to his history of acute myocardial infarction and coronary artery disease. I refer you to my letter of 1/29/07. Mr. Latsch is a 68 year old white man who contends that he experienced excessive stress while in the Army Reserve and this played a role in his sustaining a myocardial infarction back in 1987. Subsequently he needed coronary bypass surgery followed by angioplasty with stents in March 2000.

As I said in my previous letter, I feel stress played a contributing factor in the patient's coronary artery disease and progression of same. I feel that Mr. Latsch's contention that the stress contributed to his cardiac problem is reasonable. Should you have any questions, please call me. Otherwise, I remain.

Sincerely yours,

/s/ Vincent T. Randazzo
Vincent T. Randazzo, MD

VR/bz

APPENDIX P

2025658573 12:38:35 p.m. 07-19-2007 2/4
07/10/2007 12:47 1732[]152 STAPLES PAGE 03

VINCENT T. RANDAZZO, MD
248 BROAD STREET
RED BANK, NEW JERSEY 07701
732-530-3433
FAX: 732-758-1953

July 6, 2007

Re: Latsch, Robert
DOB: [REDACTED]/39

To Whom It May Concern:

Mr. Latsch asked that I please write you again in reference to his acute myocardial infarction and coronary artery disease. Please see my previous letters of 1/29/07 and 5/17/07. Mr. Latsch had an acute myocardial infarction in 1987 followed by coronary artery bypass surgery. In the year 2000, the patient had an angioplasty.

Mr. Latsch contends that the stress he experienced during his Army Reserve time precipitated his acute myocardial infarction. I feel stress can play a role in promoting coronary artery disease independent of other cardiac risk factors. Mr. Latsch, however, also has a history of hypercholesterolemia and stress can

promote coronary artery disease with this setting as well.

Hence I feel that Mr. Latsch's contention that stress contributed to his cardiac problem is reasonable. Should you have any questions, please contact me. Otherwise, I remain.

Sincerely yours,

/s/ Vincent T. Randazzo
Vincent T. Randazzo, MD

VR/bz

JUL-19-2007 11:37AM FAX:2025658573
ID: WASHINGTON D.C. VAMC PAGE:002 R=93%

APPENDIX Q

Department of Veterans Affairs **Memorandum**

Date: August 30, 2007

From: David Lu, MD /s/ D Lu

Subj: Medical Expert Opinion (Re: RL)

To: Board of Veterans' Appeals

Thru: Ross Fletcher, MD, Chief of Staff

1. I have reviewed the available medical record on patient RL.

2. The veteran had active service from September 6 to October 16, 1956. He also had service in the Army Reserves from August 1975 to August 1994. RL suffered a myocardial infarction on February 3, 1987, and underwent coronary artery bypass surgery. Coronary angioplasty was performed in 2000 and RL went on disability.

   "RL contends that the stress he experienced during his Army Reserve time precipitated his acute myocardial infarction." He "maintains that the severe stress of his reserve service, to include 2 ½ hour drive to and from his home and his duty station, the stress of his reserve duties, and his

failure to receive timely promotions caused his heart attack and coronary artery disease."

The Board of Veterans' Appeals would like an opinion

1. To reconcile the conflicting opinions as to whether the veteran's coronary artery disease is causally related to his service.

2. To provide a more detailed medical opinion as to the likelihood (i.e. very likely, as likely as not, or highly unlikely) that the veteran's currently diagnosed coronary artery disease is causally related to the "stress" . . . associated with his periods of reserve duty.

3. To explain the rationale for any opinion that conflicts with those provided by Drs C.P., C.L.M., A.R., V.T.R., and D.N.G., and Col D.P.S.

Response:

Despite published literature suggesting a correlation between psychosocial stress and the development of coronary artery disease and adverse cardiac events; it remains unclear as to the clinical significance of "psychosocial stress" relative to the known major coronary risk factors. Drs Lavie and Milani from the Ochsner Clinic found in their studies that "patients with adverse behavior factors generally had other adverse CAD risk profiles."

Psychosocial stress and personality type (Type A) haven been examined extensively, but there is insufficient evidence to link them directly as a significant risk factor for atherosclerotic heart disease.

The commonly recognized and accepted coronary risk "factors include hypertension, diabetes, smoking, hypercholesterolemia, family history, age, and male sex.

Of all the physicians who provided supporting letters for RL, Dr Alan Rozanski is most credentialed through his research in the field of psychosocial stress. Dr Alan Rozanski states more definitively of the correlation between psychosocial stress and the occurrence and progression of coronary artery disease, but other researchers are more cautious in their opinion due to lack of definitive studies. In the mean time, practicing cardiologist can only say that there seems/suggests/or appears to be a correlation between stress and coronary artery disease.

Stress is unavoidable in our society. There are work stress, home stress, and financial stress. Individual differences in response to stress, either environmental and or psychosocial, suggest a more complex biological, environmental, and psychosocial interaction. It has been suggested that an individual's underlying personality and social makeup are more important in dictating his response and reaction to outside stress. People in highly stressful jobs do not necessarily develop coronary artery disease.

It is my opinion that there is insufficient evidence to establish causality between stress and coronary artery disease. At this time, it is my opinion that psychosocial stress is as likely as not to cause coronary artery disease. As Dr CLM stated, stress may be an "up and coming" risk factor, but it remains controversial. Even IF stress played a role in RL's heart attack, I believe its role is minor in comparison to RL's other coronary

risk factors. In his medical record, it is documented that RL "smoked a pipe, but did not inhale" and that his "father and mother died of heart disease (Riverview Medical, Dr AK in 3/1994); in addition, RL has "a history of hypercholesterolemia and hypertension (Medical Health Center, Dr CP in 6/2000). RL is typical of patients in Drs Lavie's and Milani's studies with multiple CAD risk factors.

APPENDIX R

Department of Veterans Affairs
Board of Veterans' Appeals
Washington DC 20420

In Reply Refer To: 014157
C 28 250 142
LATSCH, Robert

SEP 13 2007

Ross D. Fletcher, M.D.
Chief of Staff
V AMC Washington
50 Irving St. NW
Washington, DC 20422

Dear Dr. Fletcher:

On August 30, 2007, Dr. David Lu provided a medical opinion in the case of Mr. Robert Latsch. The medical opinion provided on the above veteran was determined to be confusing and requires clarification. Please clarify the following issue: Dr. Lu states that stress is as likely as not a cause of CAD, but his opinion is largely supportive of his conclusion that there is insufficient evidence to show such an association.

If You Have Questions

- If you have questions, please call (202) 565-4748 and ask for Carol Murrell.

The information you provide is necessary for the Board to make a determination regarding the veteran's entitlement to benefits. Your protnpt attention to this matter will expedite the decision-making process at the Board, and we appreciate your efforts to assist us.

Sincerely,

/s/ Carrie M. Johnson-Clark
Carrie M. Johnson-Clark
Director, Management and Administration

Enclosures

APPENDIX S

11/29/207 09:01 FAX 7328711100 STAPLES 014
SEP-17-2007 15:26 From: To:2025658573 P.3/4-4/4

Department of Veterans Affairs **Memorandum**

Date: August 30, 2007

From: David Lu, MD

Subj: Medical Expert Opinion (Re: RL)

To: Board of Veterans' Appeals

Thru: Ross Fletcher, MD, Chief of Staff

1. I have reviewed the available medical record on patient RL.

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   RL "contends that the stress he experienced during his Army Reserve time precipitated his acute myocardial infarction. He "maintains that the

severe stress of his reserve service, to include 2 ½ hour drive to and from his home and his duty station, the stress of his reserve duties, and his failure to receive timely promotions caused his heart attack and coronary artery disease."

The Board of Veterans' Appeals would like an opinion

1. To reconcile the conflicting opinions as to whether the veteran's coronary artery disease is causally related to his service.

2. To provide a more detailed medical opinion as to the likelihood (i.e. very likely, as likely as not, or highly unlikely) that the veteran's currently diagnosed coronary artery disease is causally related to the "stress" . . . associated with his periods of reserve duty.

3. To explain the rationale for any opinion that conflicts with those provided by Drs C.P., C.L.M., A.R., V.T.R., and D.N.G., and Col D.P.S.

Response:

Despite published literature suggesting a correlation between psychosocial stress and the development of coronary artery disease and adverse cardiac events; it remains unclear as to the clinical significance of "psychosocial stress" relative to the known major coronary risk factors. Drs Lavie and Milani from the Ochsner Clinic found in their studies "that patients with adverse behavior factors generally had other adverse CAD risk profiles."

Psychosocial stress and personality type (Type A) haven been examined extensively, but there is insufficient evidence to link them directly as a significant risk factor for atherosclerotic heart disease. The commonly recognized and accepted coronary risk factors include hypertension, diabetes, smoking, hypercholesterolemia, family history, age, and male sex.

Of all the physicians who provided supporting letters for RL. Dr Alan Rozanski is most credentialed through his research in the field of psychosocial stress. Dr Alan Rozanski states more definitively of the correlation between psychosocial stress and the occurrence and progression of coronary artery disease, but other researchers are more cautious in their opinion due to lack of definftive studies. In the mean time, practicing cardiologist can only say that there seems/suggests/or appears to be a correlation between stress and coronary artery disease.

Stress is unavoidable in our society. There are work stress, home stress, and financial stress. Individual differences in response to stress, either environmental and or psychosocial, suggest a more complex biological, environmental, and psychosocial interaction. It has been suggested that an individual's underlying personality and social makeup are more important indicating his response and reaction to outside stress People in highly stressful jobs do not necessarily develop coronary artery disease.

It is my opinion that there is insufficient evidence to establish causality between stress and coronary artery disease. At this time, it is my opinion that psychosocial stress is unlikely to cause coronary artery disease. As

Dr CLM stated, stress may be an "up and coming" risk factor, but it remains controversial. Even IF stress played a role in RL's heart attack, I believe its role is minor in comparison to RL's other coronary risk factors. In his medical record, it is documented that RL "smoked a pipe, but did not inhale" and that his "father and mother died of heart disease (Riverview Medical, Dr AK in 3/1994); in addition, RL has "a history of hypercholesterolemia and hypertension (Medical Health Center Dr CP In 6/2000). RL is typical of patients in Drs Lavie's and Milani's studies with multiple CAD risk factors.

APPENDIX T

11/29/2007 09:00 FAX 7326711100 STAPLES 009

CHARLES L. MILLER, M.D., F.A.C.C.

INTEGRATED MEDICINE ALLIANCE, PA
1048 BROAD STREET, SUITE 2
SHREWSBURY, NEW JERSEY 07702
(732) 542-2124

BOARD CERTIFIED, INTERNAL MEDICINE
BOARD CERTIFIED, CARDIOVASCULAR DISEASES
CERTIFIED, CERTIFICATION BOARD OF
NUCLEAR CARDIOLOGY

PRACTICE LIMITED TO DIAGNOSTIC CARDIOLOGY

11/20/2007

To: Department of Veterans Affairs

RE: Robert Latsch SS# [REDACTED]-0277

To Whom it May Concern:

Mr. Latsch asked me to review the most recent letter concerning his disability determination as it relates to work-related stress.

In his August 30, 2007 letter Dr. Lu states that my letter stated that "stress may be an up and coming risk factor, but remains controversial". I must take issue

with this statement since my letter contained the following paragraph:

"I agree with Dr. Rozanski and Col. Speers that stress must be considered an oncoming causative factor in Mr. Latsch's heart condition. I feel if he had not had the first work-related episode that his future health would have been significantly better and that be very likely would not have had the significant on-going problems that he now has."

In the first line the word "oncoming" was a typographical error which should have been "on-going" as stated in the last line of the paragraph. In none of my correspondence have I stated I felt this was "controversial".

I treated Mr. Latsch when he had his initial episode in 1987 and I continue to feel, unequivocally, that stress has played a major role in his conorary artery disease.

I would ask that his case be reviewed in fight of the above statements and the statements of the other physicians who have written to you on Mr. Latsch' behalf.

Thank you for your consideration of this matter.

Sincerely,

/s/ Charles L. Miller
Charles L. Miller, M.D., F.A.C.C.

APPENDIX U

SEP-17-2007 15:26 From: To:2025658573 P.3/4-4/4

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Subj: Medical Expert Opinion (Re: RL)

To: Board of Veterans' Appeals

Thru: Ross Fletcher, MD, Chief of Staff

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